quinn emanuel trial lawyers | new york
51 Madison Avenue, 22nd Floor, New York, New York 10010-1601 | TEL: (212) 849-7000 FAX: (212) 849-7100

WRITER'S DIRECT DIAL NO.
(212) 849-7220

WRITER'S INTERNET ADDRESS
faithgay@quinnemanuel.com

September 14, 2012

VIA ECF

Hon Robert M. Levy
U.S. District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *In Re: Glaceau Vitaminwater Litig.*, Case No. 1:11-md-02215-DLI-RML

Dear Judge Levy:

We write to inform the Court of a recent Ninth Circuit opinion, *Davis v. HSBC Bank Nevada, N.A.*, -- F.3d ----, No. 10–56488, 2012 WL 3804370 (9th Cir. Aug. 31, 2012), issued after defendants opposed plaintiffs' class certification motions, that directly relates to the issues implicated by plaintiffs' certification request.

In *Davis*, as here, the plaintiff asserted deceptive advertising and related claims on behalf of a consumer class because certain disclosures were allegedly not prominent. The District Court dismissed the complaint, and that order was affirmed by the Ninth Circuit. The Ninth Circuit found it fatal that the plaintiff had not read the indisputably accurate disclosures that were provided. *Id.* at *6. As the Court explained, "by refusing to read [disclosures] . . . and instead assuming [other facts to be true], Davis put faith in a purported representation that was shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth." *Id.* at *7 (internal quotations omitted).

Davis provides additional authority confirming that there are outcome-determinative, individualized fact inquiries: Whether an individual proposed class member read or should have read the ingredient disclosures that defendants provided on the label of vitaminwater and, if not, whether his or her particular reason for not reading the disclosures was justifiable. (For example, did a buyer read the ingredient label, or was there a"refus[al] to read" following which the consumer applied his/her own "assum[ption]."") *See* Defs' Br. In Opp. To Pls' Master Mot. For Class Cert. at 16-22.

Respectfully,

/s/ Faith E. Gay